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No. 91-703

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

GUSTO RECORDS, INC. and G.M.L., INC.,

*Petitioners,*

vs.

B.J. THOMAS, GENE F. PITNEY, SHIRLEY OWENS ALSTON, DORIS COLEY JACKSON, BEVERLY LEE, and VERNON McFADDEN, JR.,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

It should be readily apparent from its face that there is no plausible basis for the petition for certiorari in this case. No constitutional or statutory issue is put before this Court, and there is no asserted conflict between or among the circuits. Nor is there any showing that the case's resolution will affect other than the parties to it – and certainly none that it will have such a wide impact that this Court should exercise its general supervisory jurisdiction, as petitioners would have it do. Rather, this heavily fact dependent dispute relates largely to the

application of routine principles of state law to interpret three different early 1960's recording artists' contracts.

As may be seen from the opinion of the United States District Court for the Middle District of Tennessee, Petition for Writ of Certiorari Appendix at 56-73 ("A.__") , the trial judge carefully considered the evidence and resolved the issues before him with a reasoned and reasonable exposition of the facts and the law. The United States Court of Appeals for the Sixth Circuit affirmed (A.37-53). That court was unanimous on all issues but one, including the second and third questions which petitioners ask this Court to hear. Even as to the remaining issue, the first question presented to this Court, the dissenting judge did not differ as to the rule of law to be applied; she would merely have remanded to the trial court for more explicit factual findings (*see* A.52-53). Petitioners' request to the court of appeals for rehearing before the panel was denied, with the dissenting judge still wishing to remand for factual findings (A.36). Rehearing en banc was denied unanimously (*id.*).

## STATEMENT OF THE CASE

Recording artists B.J. Thomas, Gene Pitney, and the Shirelles entered into separate recording contracts with different record companies in the 1960's (*see*, *e.g.*, A.1-35). Those contracts expressly provided that the artists would regularly receive royalties on the use of their master recordings (the templates from which records, tapes, and compact discs are made) (*e.g.*, A.2).

Petitioners obtained the Shirelles' master recordings before the statute of limitations period commenced (A.52). They obtained Mr. Thomas' and Mr. Pitney's two years after the statute had begun to run (A.48). Petitioners paid the artists no royalties.

Insofar as relevant to the questions presented for review in this Court, the lower courts followed the established law of New York, the state in which the contracts were executed and originally performed, by reading into them the custom and practice of the recording industry, confirmed by the actual course of dealing between the artists and the prior owners of the masters, to

the extent consistent with the contracts' express terms (A.42-43, 45). As a consequence, they applied a fifty percent royalty rate on licensing income (income which a master recording's owner receives for permitting another record company to use that master) (A.43-46). Those courts also found on the facts of this case, applying the law of Tennessee, the state in which both transferor and transferee did business and in which the transfer took place, that petitioners had assumed their transferor's unpaid royalty obligation back to the limitations period (A.47-48).

## ARGUMENT

## THE WRIT SHOULD BE DENIED.

### A. *Successor Liability*

The first question which the petition presents is one of successor liability: whether the purchaser of a master recording (and assignee of the contract under which it was recorded) assumes its seller's unpaid royalty obligations to the other contracting party (here, the recording artists). That is a garden variety contract question on which there is considerable law. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 328 (1981) (presumption when contract is assigned that obligations from assignor carry over to assignee). Indeed, the court of appeals here specifically noted that it was applying "the general rule" of successor liability (A.48). The appeals court, like the district court, then applied that law to the evidence, the majority concluding in agreement with the district judge's outcome that the normal standard had been met (*id.*), and the dissenting judge pressing for a remand for more detailed findings (A.53).

Petitioners' apparent claim that the courts below held that the mere purchase of assets automatically results in the purchaser's liability for the predecessor's obligations, Petition for Writ of Certiorari at 9-11 ("Petition"), is thus simply wrong. Similarly misplaced is petitioners' reliance upon a book, S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC (5th ed. 1985). The book was not even part of the trial record; and if it were, the two excerpts of that book to which petitioners cite are simply

beside the point: the first, *id.* at 291, relates to copyright royalties rather than artists' royalties (the portion of the book set out at A.74-78 is apparently other than that cited in the petition), and the latter, *id.* at 22 (A.78-80), relates to the priority of obligations of a recording company as a debtor under the Bankruptcy Code. Petitioners' additional assertion that the issues on which they seek this Court's review involve both a question of first impression, *see* Petition at 8, and a departure from accepted legal principles, *see, e.g., id.* at 9, is thus as erroneous as it is self-contradictory.

But when all is said and done, whatever the merits of petitioners' argument, it has been fully addressed and decided by the courts below. Their suggestion that this nation's highest Court should consider the Tennessee law of successor liability rings hollow indeed.

B. *Licensing Royalties*

The second and third questions which the petition presents likewise are lacking in moment and were correctly resolved below. As to the second issue, there was overwhelming evidence of the custom and practice in the industry that a fifty percent rate on licensing fees is paid to the artist. As set forth in the opinion of the court of appeals (A.42-43), the governing New York law has consistently held that custom and practice may be used to fill such gaps in contracts. As to the third issue, the court of appeals correctly held that there was no contradiction between the express terms of these contracts, on the one hand, and industry custom and practice, on the other (A.43-46).

Petitioners' attempt to rely on *Pevensey Press, Ltd. v. Prentice-Hall, Inc.*, 161 A.D.2d 500, 555 N.Y.S.2d 769 (1st Dep't 1990), a decision by one of New York's four intermediate appellate courts, is hard to understand. *Pevensey* held only that a geographic restriction on resale in a contract between a buyer and a seller does not bind the seller's customers who were not party to that contract. In this case, in contrast, the recording contracts were assigned to petitioners. By operation of law, therefore, they stood in their assignor's shoes and became bound by the

contracts' terms. Moreover, petitioners' reading of *Pevensey* makes no sense, since it would mean that they could exploit these master recordings forever and, because the original record companies had long since disappeared, the artists would be entitled to nothing.

Petitioners' further reliance on paragraph 8 of Mr. Thomas' and the Shirelles' contracts (*see* A.11, 19-20, 30-31) is equally perverse. The mere fact that petitioners own (and their predecessors owned) the artists' master recordings hardly means that the recording companies do not owe the artists royalties. Indeed, petitioners' proffered reading of these paragraphs and of *Pevensey* cannot be squared with the admitted existence of express royalty provisions in the contracts and the concession below that royalties in some amounts were in fact owed (*see* A.60-62).

Petitioners' argument against Mr. Pitney's entitlements is no more meritorious. Essentially it is that his contracts expressly provided a rate for licensing royalties based on sales by licensees and that, therefore, judicial resort to custom and practice was precluded. *See* Petition at 12. However, both lower courts correctly interpreted these contracts as expressly addressing only those situations in which the licensee has a business relationship connecting it to the masters' owner (A.44-45, 47). Given that conclusion, it is unnecessary to figure out how petitioners could simultaneously argue to this Court both that the two percent rate which they supposedly derive from Mr. Pitney's contract is applied only to the license fees which the record company receives, Petition at 15-16, and that "Pitney's contract made no provision for royalties to be paid him out of . . . license fee income. . .," *id.* at 6.

## CONCLUSION

It should be readily apparent that the petition for certiorari should never have been filed. The respondent artists have been waiting years to be paid their due. This Court should therefore deny the petition and allow respondents finally to collect the royalties to which they have been found entitled.

Respectfully submitted,

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